

10-1-1967

## Ex Parte 230: The ICC "Piggyback" Rulemaking Case

Eugene D. Anderson

Paul D. Borghesani

William H. Towle

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/bclr>



Part of the [Transportation Law Commons](#)

---

### Recommended Citation

Eugene D. Anderson, Paul D. Borghesani & William H. Towle, *Ex Parte 230: The ICC "Piggyback" Rulemaking Case*, 9 B.C.L. Rev. 23 (1967), <http://lawdigitalcommons.bc.edu/bclr/vol9/iss1/2>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact [nick.szydowski@bc.edu](mailto:nick.szydowski@bc.edu).

## EX PARTE 230: THE ICC "PIGGYBACK" RULEMAKING CASE

EUGENE D. ANDERSON\*

PAUL D. BORGHESANI\*\*

WILLIAM H. TOWLE\*\*\*

### I. INTRODUCTION

The practice of using a rail-carrier flatcar to transport a motor-carrier trailer for a portion of the latter's designated journey has only recently become a factor of major economic importance. This practice is commonly referred to as "trailer-on-flatcar" (TOFC) service, or "piggyback" service.<sup>1</sup> The use of "piggyback" or TOFC transportation has proven to be beneficial to rail carriers and in fact, has allowed the railroads to retain and develop a large volume of traffic which might otherwise have been lost to both motor common carriers and, increasingly, to shippers who had developed their own trucking fleets.<sup>2</sup> The Interstate Commerce Commission which is responsible for the regulation of trailer-on-flatcar operations has stated that the

rapid growth of piggyback has been largely the result of its effectiveness in meeting the need for coordinated rail and motor services. Piggyback combines the advantages of movement by truck with the long-haul economies of rail or water transport, under conditions which hold total expense to a minimum.<sup>3</sup>

While the "piggyback" concept has created a new degree of coordination between motor and rail carriers, it was not a significant

---

\* A.B., University of Illinois, 1952; J.D., Loyola University, 1955; LL.M., Georgetown University, 1959; Member, Illinois and District of Columbia Bars; Attorney, in private practice with offices in Chicago, Illinois and Washington, D.C.

\*\* B.S., Tufts University, 1960; LL.B., Boston College Law School, 1963; Member, Massachusetts Bar; Attorney-Advisor, Interstate Commerce Commission, Washington, D.C.

\*\*\* B.S., University of Illinois, 1954; LL.B., Harvard University, 1959; Member, Illinois Bar; Attorney, Legal Department, Swift & Company, Chicago, Illinois; Instructor, John Marshall Law School.

The views and opinions expressed herein are those of the authors and not necessarily those of the Interstate Commerce Commission and are not binding thereon. The authors would like to express appreciation for the assistance of Mr. Richard R. Sigmon of the District of Columbia Bar and Mr. Joseph D. Feeney of the Illinois Bar.

<sup>1</sup> For a concise history of the beginnings of TOFC see Anderson & Loos, *Piggyback Plans*, 3 B.C. Ind. & Com. L. Rev. 335 (1962).

<sup>2</sup> See E. Zane, *Trailer-on-Flatcar: An Economic Analysis of Piggyback Transportation in New England 1* (Research Report (No. 27) to Federal Reserve Bank of Boston, 1964).

<sup>3</sup> ICC Statement 66-1, *Piggyback Traffic Characteristics* (1966). See also Merrill J. Roberts & Assoc., *Intermodal Freight Transportation Coordination: Problems and Potential* (Graduate School of Business, University of Pittsburgh, 1967).

segment of the interstate commerce picture at the time regulatory legislation was being drafted, causing serious questions later to arise regarding its regulation. Part I of the Interstate Commerce Act,<sup>4</sup> setting forth provisions for the regulation of common carriers by rail, was enacted in February of 1887 and was, until 1935, the whole body of that Act. The Motor Carrier Act of August, 1935, subsequently included as Part II of the Act,<sup>5</sup> sets forth the provisions for regulation of motor carriers. Since the Act regulates these two modes of transportation separately and does not interrelate the regulation of different modes, uncertainty arose as to how to regulate TOFC—a combination of these two separate modes. This controversial issue demanded resolution. In 1964, the Interstate Commerce Commission promulgated a set of eight rules in an effort to resolve the controversy and to establish standards which would provide a degree of continuity while remaining flexible enough to allow for future growth and innovation.<sup>6</sup> This article will offer a discussion of these rules, the controversy which they have provoked, and the significant litigation resulting therefrom.

#### A. *Piggyback Service Provided Under Five Plans*

Basically, piggyback service has been thought of as *rail* service, and has been discussed and utilized in terms of five different plans of operation.<sup>7</sup>

1. *Plan I.* This involves railroad movement, as a substituted service,<sup>8</sup> of trailers or containers owned by motor common carriers, with the motor carrier dealing with both consignors and consignees of shipments; performing service to and from the rail-loading and -unloading areas, and billing the freight under rates in regular motor-carrier tariffs. The shipper has the option to direct that substituted service not be used. Payments to the rail carrier for the substituted service often are stated as flat charges per trailer.

2. *Plan II.* In this plan, the railroad offers a complete service between the loading docks of shippers and receivers in the terminal areas. The line-haul transportation is performed by the railroad which also supplies the terminal-area services of pick-up and delivery, providing both trailers and flatcars. Charges for this TOFC service are

<sup>4</sup> 24 Stat. 379 (1887), as amended, 49 U.S.C. §§ 1-27 (1964), as amended, 49 U.S.C. §§ 1, 5, 20 (Supp. II 1965-66).

<sup>5</sup> 49 Stat. 544 (1935), as amended, 49 U.S.C. §§ 1-27 (1964), as amended, 49 U.S.C. §§ 302, 304-05, 308, 312, 314, 322 (Supp. II 1965-66).

<sup>6</sup> Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (hereinafter referred to as Ex Parte 230), 322 I.C.C. 301 (1964).

<sup>7</sup> Id. at 304-05, 309-12.

<sup>8</sup> "Substituted service" is a phrase which also connotes things other than the particular service described in Plan I and these other meanings will not be touched upon in discussion of the ICC "piggyback" proceeding. See Anderson, Black Diamond and the Concept of Railroad Substituted Service Authority, 33 ICC Prac. J. 159 (1965).

based on railroad published rates and often duplicate motor-carrier rates because plan II was directed specifically at meeting competition from that mode.<sup>9</sup>

3. *Plan III.* The railroad furnishes the flatcars, performs the line-haul service, and loads and unloads the trailers, which are owned or leased by the shipper or freight forwarder. Transportation of the trailer to and from the rail-loading and -unloading areas is the responsibility of the shipper or forwarder, while the railroad is responsible for placing the loads on and removing them from the cars. Plan III rates are generally based on a flat charge.

4. *Plan IV.* Plan IV is much like III but differs in that the flatcar, as well as the trailer, is supplied by the shipper or freight forwarder and placing the trailers on and removing them from the flatcar is the responsibility of the shipper or forwarder. The railroad, however, may provide this loading service at a published charge. Rail rates apply to trailers, loaded or empty, on the shipper's flatcar. Plan IV rates have been constructed at levels below plan III rates to allow for the expense of flatcar ownership.

5. *Plan V.* This plan is the counterpart of plan I. Service is based on through-route<sup>10</sup> and joint-rate coordination of rail and motor carriers. Traffic is routed intermodally, but, unlike plan I, no option is given the shipper of using or not using a substituted mode. Either carrier may solicit traffic for through movement. Arrangements may be for the entire length of a given haul or for part only with return to the originating carrier at some intermediate point.

#### B. *The Need for a Rulemaking Proceeding*

The Interstate Commerce Commission, on June 29, 1962, instituted its second general investigation into piggyback service<sup>11</sup> and it

---

<sup>9</sup> Plan II 1/2. A variation of plan II where the trailers are owned by the railroads, but consignors and consignees must move the trailers between the ramp sites and their warehouses and also perform the loading and unloading. The consignor must accept the empty trailers at a location immediately adjacent to the carrier's loading ramp at origin, assume the loading expense, and deliver the loaded trailers to the carrier at the same location. The consignee must accept delivery of the loaded trailer from the carrier at a location immediately adjacent to the carrier's unloading ramp at destination, assume the unloading expense and return the empty trailer or container to the carrier at the same location.

ICC Statement 66-1, *supra* note 3, at 5.

<sup>10</sup> In *Thompson v. United States*, 343 U.S. 549, 556-57 (1952), the Supreme Court defined a "through route" as "an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. . . . Through Routes and Through Rates, 12 I.C.C. 164, 166 (1907)." With the advent of significant motor-rail piggyback operations this term has been applied to continuous carriage of goods by a combination of motor and rail carriers.

<sup>11</sup> The Interstate Commerce Act gives the Commission the authority to "inquire into and report on the management of the business of all common carriers" and "obtain from

was this investigation, including therein a realignment of existing precedents and practices, which led to the adoption of eight rules "found necessary to regulate coordinated and substituted service transportation in the public interest."<sup>12</sup> At a prehearing conference held in the investigation, a series of proposed rules were distributed. These were designed to serve as a framework upon which rules ultimately to be adopted could be developed. The proposed rules represented something of a new approach to TOFC terminology—a recognition of the bimodal character of piggyback service. They attempted to separate TOFC service into two basic classes, without regard to the five plans then and now in common usage. One class was termed "intermodal" TOFC service, essentially involving traffic moving pursuant to a negotiated agreement between carriers of different modes. The other class was "all-rail" TOFC service, which would include any piggyback service in which traffic moves exclusively at rail rates and on rail billing. The Commission's examiners, in their report and recommended order, recognized the "joint intermodal" and "all-rail" divisions, but chose also to retain the five plans. Consequently, plans I and V are now classed as "joint intermodal" and plans II, III, and IV are classed as "all-rail." The heart of the controversy concerning the new ICC rules has been this new characterization of TOFC service as bimodal rather than solely rail service.<sup>13</sup>

## II. RULES 2 AND 3: THE OPEN-TARIFF REQUIREMENTS

In *Ex Parte 230*, before setting forth the basic bimodal concept in rules 2 and 3, the Commission defined TOFC service in rule 1 which was to serve as a foundation for the remainder of the rules.

Trailer-on-flatcar (TOFC) service means the transportation on a rail car, in interstate or foreign commerce, of (a) any freight-laden highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis); or (b) any empty highway truck, trailer, or semitrailer (or the container portion . . . ) when such empty equipment is being transported incidental to its prior or subsequent use in TOFC service . . .<sup>14</sup>

---

such carriers . . . such information as the Commission deems necessary to carry out the provisions of [the Act]." 49 U.S.C. § 12(1) (1964). The first TOFC investigation conducted by the Commission is reported in the so-called *New Haven* case, *Movement of Highway Trailers by Rail*, 293 I.C.C. 93 (1954).

<sup>12</sup> *Ex Parte 230*, 322 I.C.C. at 303. A rulemaking proceeding was chosen by the Commission in order to facilitate the gathering of information and to avoid the inefficiencies involved in solving fundamental piggyback problems on a case-by-case approach.

<sup>13</sup> For a general discussion of the initial proposals in this rulemaking proceeding see *Ex Parte 230*, 322 I.C.C. at 319-21.

<sup>14</sup> 49 C.F.R. § 500.1 (1967); 322 I.C.C. at 327.

## THE "PIGGYBACK" RULEMAKING CASE

Rules 2 and 3 are the most significant of the eight new rules, as they set down new piggyback policy and requirements, and overturn many of the Commission's past decisions.<sup>15</sup> Rule 2 is a statement of the common-carrier obligation of railroads as it relates to trailer-on-flatcar service.

*Availability to all of TOFC service.*—TOFC service, if offered by a rail carrier through its open-tariff publications, shall be made available to any person at a charge no greater and no less than that received from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.<sup>16</sup>

Rule 3 essentially provides that motor common and contract carriers and water common and contract carriers and freight forwarders may utilize trailer-on-flatcar service under open-tariff rates in the performance of their authorized service.<sup>17</sup> The rule qualifies this general provision by stating that motor and water common carriers shall utilize open-tariff TOFC service only if: (1) their tariff publications give notice that such service may be utilized at their option, but that the right is reserved to the user of their services to direct that, in any given instance, TOFC service not be utilized; (2) their transportation contracts and schedules make appropriate provision therefor; and (3) the tariffs and schedules set forth the points between which TOFC service may be performed and the names of the rail carriers whose TOFC service may be utilized.<sup>18</sup>

Underlying all the rules, but implicit in rules 2 and 3, is the "basic premise that all persons desiring to use TOFC service should be able to do so, with the charges for the same services being equal to all users, whether they be motor or water carriers, freight forwarders, or private shippers."<sup>19</sup> For this reason, the issue was raised during the rulemaking proceeding as to "whether, and under what circumstances or requirements, TOFC service provided under an 'open tariff' can and should be made available to everyone (including freight forwarders, express companies, and common and contract motor and water carriers, exempt or regulated)."<sup>20</sup>

The major concern of the railroads,<sup>21</sup> as expressed by the Com-

---

<sup>15</sup> 322 I.C.C. at 330-36.

<sup>16</sup> 49 C.F.R. § 500.2 (1967); 322 I.C.C. at 336-37.

<sup>17</sup> 49 C.F.R. § 500.3 (1967); 322 I.C.C. at 337.

<sup>18</sup> *Id.*

<sup>19</sup> 322 I.C.C. at 319.

<sup>20</sup> *Id.* at 328-29.

<sup>21</sup> For a general discussion of the arguments advanced by the various parties involved in the *Ex Parte* 230 proceeding with respect to rules 2 and 3 see 322 I.C.C. at 327-37.

mission in *Ex Parte 230*, was that should motor carriers be given the opportunity to utilize TOFC service at the open-tariff rates for their line-haul movements they would be in a position to direct traffic from all-rail TOFC service. The other carriers argued, however, that whenever such service is used the immediate result is revenue to the railroad. It was also the concern of some that the use of open-tariff TOFC service by motor carriers would be in contravention of the stated national transportation policy "to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act . . . so administered as to recognize and preserve the inherent advantages of each . . ."<sup>22</sup> The western railroads argued, for instance, that motor carriers would be able to exploit the railroads' acknowledged inherent advantage as the nation's low-cost line-haul carrier of goods for great distances, and that this inherent advantage would be submerged, to be used as a means by which motor carriers could establish their primacy in surface transportation.

In reply to these contentions, the Interstate Commerce Commission pointed out that

*all* TOFC service is inherently bimodal in that its basic characteristic is the combination of the inherent advantages of rail and motor transportation: the railroad's ability to provide efficient line-haul transportation of huge volumes of freight for great distances at high speed; and the motor carrier's ability to provide door-to-door, and if necessary job- or farm-site, pickup and delivery. TOFC could even be said to be *trimodal*, because added to the two factors already mentioned is its ability to combine in a type of container service many small shipments—a type of service which has become associated with the business of the freight forwarder.<sup>23</sup>

The rail carriers also protested use of open-tariff TOFC service by other carriers on the ground that such use had previously and consistently been considered by the Commission to be repugnant to the Interstate Commerce Act. The Commission had held that a person could not act as both a carrier and a shipper with respect to the same service. In *Ex Parte 230*, the ICC, while not disputing the fact that statements to this effect had been made, explained that it did not

understand the courts to have taken the inflexible position that an administrative agency, even if it has followed a consistent line for some time, cannot, when faced with new developments or an appreciably changed factual picture in the

---

<sup>22</sup> National Transportation Policy, 54 Stat. 899 (1940) (inserted before Chapters 1, 8, 12, 13, and 19 of the Interstate Commerce Act).

<sup>23</sup> 322 I.C.C. at 329-30.

## THE "PIGGYBACK" RULEMAKING CASE

segment of the national life which it is charged with regulating, alter its past interpretation in a formal proceeding . . . where rules having future effect are to be issued.<sup>24</sup>

The Commission went further, however, and attempted to show that its holding in the *Substituted Freight Service* case,<sup>25</sup> relied on by the railroads in support of their contention, was not necessarily contrary to its current position. After a discussion of the circumstances involved in that case and other similar cases, the Commission concluded that in saying that a person could not be a carrier and shipper as to the same service, it did not intend to proscribe the kind of substituted service in which one common carrier service is substituted for another through the use of an open-tariff rate of the carrier performing the substituted service. What this language was directed at was the use of open-tariff service by a carrier not acting in its proper role of carrier, but acting, instead, as a shipper or forwarder. The Commission surmised that such a situation might occur were a carrier to tender a shipment to another carrier for transportation to a point it could not serve, or over a route it could not use, or without providing in its tariffs for the substitution.

The Commission concluded, then, in adopting rules 2 and 3 that when TOFC service is offered by a rail carrier to the public generally, there is nothing to preclude its use by motor or water common or contract carriers, in lieu of their all-highway operations in the performance of authorized transportation between authorized service points, or by for-hire carriers engaged in transportation which is exempt from economic regulation. To the extent that this conclusion differs from that expressed in any of our previous decisions . . . such decisions are hereby overruled.<sup>26</sup>

As previously noted, piggyback service has traditionally been thought of as rail service. The adoption of rules which reflected the ICC's belief that the service was really bimodal, provoked immediate litigation in an effort to determine the validity of these rules and their true impact on the rail and motor carriers.

In rules 2 and 3, the Commission had concluded that motor common and contract carriers and water common and contract carriers could utilize trailer-on-flatcar service in performing all or any portion of their authorized service through the use of open-tariff rates published by the rail carriers. In 1965, in *Atchison, T. & S.F. Ry. v. United*

---

<sup>24</sup> Id. at 331.

<sup>25</sup> 232 I.C.C. 683 (1939).

<sup>26</sup> 322 I.C.C. at 336.



*States*,<sup>27</sup> the District Court for the Northern District of Illinois set aside rules 2 and 3.

The district court believed that the affirmative commands of rules 2 and 3 were not warranted by Sections 2 and 3 of the Interstate Commerce Act. Section 2 prohibits a rail carrier from discriminating in rates or rebates between persons for which it does "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances . . . ."<sup>28</sup> Section 3(1) states that it shall be unlawful for any rail carrier to cause any undue or unreasonable preference or advantage to any particular person, or to subject any person to any undue or unreasonable prejudice or disadvantage: "Provided, however, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."<sup>29</sup> In seeking to find specific statutory support for the rules, the court narrowly construed sections 2 and 3. Though conceding that these sections are complementary and must be read *in pari materia*, the court failed to note that they must also be read in the context of other provisions of the Act relating to the common carrier obligation. It did not recognize that rules 2 and 3 do more than "compel the railroads to afford TOFC service to motor carriers if it is provided for others."<sup>30</sup> The rules are designed to eliminate discrimination in both rates and service. Rule 2 says not only that all may utilize TOFC service, but also that they may use it at the same charge for substantially the same service. The district court rejected the contention that section 3 supports the open-tariff rules, because of the proviso excluding from that section's coverage "discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."<sup>31</sup> In doing so, the court also rejected the legislative history of this proviso which demonstrates that it was intended to safeguard the rates of other carriers against claims that they were unduly prejudicial to the traffic of the rail carrier.<sup>32</sup>

The court, concluding that both rules must fail, held that under the Interstate Commerce Act railroads may exclude motor carriers from the public which they are required to serve as common carriers and that a motor carrier is not authorized to use trailer-on-flatcar service unless the railroad from whom it desires this service consents.<sup>33</sup> The district court referred to the compartmentalization of transportation by the Interstate Commerce Act, in other words, the fact

<sup>27</sup> 244 F. Supp. 955 (N.D. Ill. 1965).

<sup>28</sup> 49 U.S.C. § 2 (1964).

<sup>29</sup> 49 U.S.C. § 3(1) (1964).

<sup>30</sup> 244 F. Supp. at 962.

<sup>31</sup> 49 U.S.C. § 3(1) (1964).

<sup>32</sup> See 79 Cong. Rec. 5656 (1935).

<sup>33</sup> 244 F. Supp. at 967-70.

that the various modes of transportation are dealt within in separate parts, and the court sought to deal with trailer-on-flatcar service in terms of these rigid modal divisions. Additionally, it treated trailer-on-flatcar service, not as intermodal, but as a rail service, which ICC Rules 2 and 3 would require the railroads to offer to motor carriers. The district court's view is demonstrated in its reference to an "underlying statutory scheme that limits the carrier in each mode to transportation within and by that mode, absent special exception."<sup>34</sup>

The court's view of trailer-on-flatcar service as essentially a rail service precipitated its conclusion that the open-tariff rules conflict with the permissive aspects of Section 216(c) of the Act which states that "[c]ommon carriers of property by motor vehicle *may* establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water . . . ."<sup>35</sup> (Emphasis added.) Therefore, it found that motor carrier use of TOFC service would be tantamount to shipment by other modes which is authorized only under section 216(c) and only on a voluntary basis. This finding was also based upon the assumption that the offering by a motor carrier of trailer-on-flatcar service, utilizing in part a rail movement under open-tariff rates, results in compulsory *de facto* through routes.<sup>36</sup>

Trailer-on-flatcar service, being essentially bimodal, is neither an exclusive rail service nor an exclusive motor service, and it cannot be shaped to fit the measure of any one part of the Interstate Commerce Act. In TOFC service, the clear distinction between the inherent advantages of the various modes of transportation has been eliminated and a combination rail-motor service has sprung up. This coordination of motor and railroad, and the combination of their individual advantages is an established fact. The advantages of this bimodal service are today being exploited by the rail carriers, not just to service traffic traditionally transported by rail, but to capture "a substantial volume of traffic that previously had been moving by other modes of transportation, private and for-hire."<sup>37</sup>

The assumption of the district court, that application of rules 2 and 3 will result in compulsory *de facto* through routes, is not warranted. On the contrary, the motor carrier, in tendering a shipment under a rail open-tariff, does not participate with the railroad in offering a through-transportation service. The services held out by the railroad and the bill of lading contract between it and the motor carrier encompass only the portion of the movement under the open-tariff pro-

<sup>34</sup> Id. at 965.

<sup>35</sup> 49 U.S.C. § 316(c) (1964).

<sup>36</sup> 244 F. Supp. at 965.

<sup>37</sup> 322 I.C.C. at 307.

vision. The railroad has no contract with, and is subject to no contractual or statutory liability to, the original shipper. In sum, what is involved is the unilateral substitution by the motor carrier of a TOFC movement for a portion of the highway movement. The shipper's bill of lading contract is only with the motor carrier and the service is that of the motor carrier. As noted in *Thompson v. United States*,<sup>38</sup> the existence of a through route depends on whether or not the participating carriers hold themselves out as offering through transportation service.<sup>39</sup>

The critical issue that needed to be determined was whether a common carrier might be compelled to hold out its service to the public on equal terms or whether it might select only that segment of the public which it chose to serve. An open tariff, by definition, holds out service to the public without qualification except that users must meet the lawful tariff requirements. The Commission has construed the Interstate Commerce Act to forbid railroad discrimination against motor carriers in the services afforded and to impose upon the railroads a duty to serve motor carriers equally with private shippers.<sup>40</sup> The district court's conclusion regarding rules 2 and 3 apparently resulted from a segmented consideration of the Commission's report and failed to give proper weight to this duty of the rail carrier. This failure seemingly resulted from the court's attempt to find explicit support for these rules in a single section of the Act.

In *ICC v. Delaware, L. & W.R.R.*,<sup>41</sup> involving the claimed right of a common carrier to discriminate in its holding out to the public, the Supreme Court noted the common carrier duty to serve.

The contention that a carrier when goods are tendered to him for transportation can make the mere ownership of the goods the test of the duty to carry, or, what is equivalent, may discriminate in fixing the charge for carriage, not upon any difference inhering in the goods or in the cost of the service rendered in transporting them, but upon the mere circumstance that the shipper is or is not the real owner of the goods is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the rights of shippers as to demonstrate the unsoundness of the proposition by its mere statement. . . . [N]othing in the duties of a common carrier by the remotest implication can be held to imply the power to sit in judgment on the title of the prospective shipper who has tendered goods for transportation.<sup>42</sup>

---

<sup>38</sup> 343 U.S. 549 (1952).

<sup>39</sup> *Id.* at 557.

<sup>40</sup> *Id.* at 335.

<sup>41</sup> 220 U.S. 235 (1911).

<sup>42</sup> *Id.* at 252-53.

While the Commission, in *Ex Parte 230*, may not have explicated its reasoning to the satisfaction of the district court, a more liberal judicial review could have discovered the broadly based duty of the common carriers by rail. The district court seemed also to impliedly question the Commission's authority to adopt such rules, yet the ICC in its report had referred to these rules as those needed "to implement the broad provisions of existing legislation,"<sup>43</sup> and had specifically relied on its broad rulemaking power.<sup>44</sup> Section 12 of the Interstate Commerce Act states that the Commission is "authorized and required to execute and enforce" the provisions of Part I of the Act.<sup>45</sup>

The district court also concluded that the open-tariff rules were in conflict with the provisions of Part IV of the Interstate Commerce Act, which sets forth provisions for the regulation of freight forwarders.<sup>46</sup> The court's reasoning is premised upon the assumption that a motor carrier utilizing TOFC service is not operating as a motor carrier. This reasoning results from the fact that in a TOFC service situation the motor carrier may be doing little more than picking up and delivering the freight. However, assembly and delivery of small-lot shipments are not unique attributes of freight forwarders. As long as a motor carrier is performing such assembly and delivery as a "motor carrier," he is excluded from the definition of "freight forwarder" as found in Section 402(a)(5) of the Act.<sup>47</sup>

The district court's final ground for rejecting the open-tariff rules is based on the long line of past Commission decisions, e.g., *Substituted Freight Service*,<sup>48</sup> wherein the Commission declared it to be repugnant to the Interstate Commerce Act for any person to act as a carrier and a shipper as to the same service.<sup>49</sup> The Commission's contention regarding the invalidity of this objection has already been discussed. The effect of a holding such as that of the district court would be either to force administrative agencies into an undesirable rigidity or to cause them to restrain from setting standards or taking any firm positions. The Commission admits that were it summarily to reject its past holdings and attempt somehow to penalize some individual for engaging in a course of conduct in line with the past holdings, it would be subject

<sup>43</sup> 322 I.C.C. at 324.

<sup>44</sup> "Under parts II, III, and IV of the act, we are given a general rulemaking power by sections 204(a)(6), 304(a), and 403(a), respectively . . ." *Id.* The sections referred to are: 49 U.S.C. §§ 304(a)(6), 904(a), 1003(a) (1964).

<sup>45</sup> 49 U.S.C. § 12(1) (1964).

<sup>46</sup> 49 U.S.C. §§ 1001-22 (1964), as amended, 49 U.S.C. §§ 1006, 1017 (Supp. II 1965-66). These provisions forbid any person to act as a freight forwarder without a permit issued by the Commission and prohibit the issuance of such a permit to a common carrier. *Id.* at §§ 1010(a)(1), (c).

<sup>47</sup> 49 U.S.C. § 1002(a)(5) (1964).

<sup>48</sup> 232 I.C.C. 683 (1939).

<sup>49</sup> *Id.* at 688, 690.

to an objection. Here, however, no one is being penalized for conduct based on past holdings, and further, the whole justification for the establishment of administrative agencies is to permit a development of the law to meet new circumstances. Congress has cast the regulatory provisions in general terms and left it to the agencies to spell out the contents of those terms. The Commission, in *Ex Parte 230*, was re-evaluating past decisions in the light of the recent spectacular growth of trailer-on-flatcar service. Since the earlier decisions were rendered during the infancy of piggyback service, the re-evaluation was necessary.

In 1967, this controversy reached the Supreme Court in *American Trucking Ass'ns v. Atchison, T. & S.F. Ry.*<sup>50</sup> The issue presented was the validity of rules 2 and 3, and, specifically, whether the Interstate Commerce Commission has the authority to promulgate rules providing: (1) that railroads which offer TOFC service to the public under open-tariff publications must make such service available on the same terms to motor and water common and contract carriers; and (2) that motor and water carriers may, subject to certain conditions, utilize TOFC facilities in the performance of their authorized service.<sup>51</sup>

The Supreme Court, in considering rule 2, noted that the Interstate Commerce Act codified the common law obligations of railroads as common carriers.<sup>52</sup> Speaking with reference to Sections 1(4), 2 and 3(1) of the Act,<sup>53</sup> the Court stated:

The Act does not contain any provision expressly exempting traffic offered by carriers by motor vehicle from these broad common-carrier obligations of the railroads. On the contrary, these sections of the Act, read in light of the historic obligations and duties of common carriers and the large number of decisions of the Commission, and of the courts in this country and in England, indicate, presumptively at least, that railroads may not offer the service of transporting trailers for other shippers and deny that service to motor carriers.<sup>54</sup>

The Court felt that the Commission's rule 2 was practically a paraphrase of Section 2 of the Act, and further believed that it was of no consequence that the Act did not expressly command that the railroads furnish this service to motor carriers. The Court stated that the rail-

---

<sup>50</sup> 387 U.S. 397 (1967).

<sup>51</sup> *Id.* at 400.

<sup>52</sup> *Id.* at 406.

<sup>53</sup> Section 1(4) provides in part: "It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers. . . ." 49 U.S.C. § 1(4) (1964). For provisions of sections 2 and 3(1) see text accompanying notes 28 and 29 *supra*.

<sup>54</sup> 387 U.S. at 407.

roads' obligation is "comprehensive and exceptions are not to be implied. The fact that the person tendering traffic is a competitor does not permit the railroad to discriminate against him or in his favor."<sup>55</sup>

The Supreme Court was previously faced with a similar intermodal problem in the case of *United States v. Pennsylvania R.R.*<sup>56</sup> There, the Court rejected the contention that the Transportation Act of 1940, which established Part III of the Interstate Commerce Act,<sup>57</sup> providing for the regulation of water carriers, did not in specific language authorize the Commission to require rail carriers to interchange their freight cars with competing water carriers. The Court also emphatically rejected the very basis upon which the district court in the *Santa Fe* case was later to premise its decision, namely, that since the Act regulates rail, motor, and water carriers separately, the Commission may not compel the mutual furnishing of services and facilities. The Court, considering the National Transportation Policy, held that the Interstate Commerce Act is designed "to provide a completely integrated interstate regulatory system over motor, railroad, and water carriers . . ."<sup>58</sup> and that the Commission, therefore, has powers commensurate with that goal. It then concluded:

In view of this, we cannot accept arguments based upon arguable inference from nonspecific statutory language, limiting the Commission's power to adopt rules which, essentially, reflect its judgment in light of current facts as to the proper interrelationship of several modes of transportation with respect to an important new development.<sup>59</sup>

The Court found to be without merit the contention that there is an implied congressional purpose in Section 216(c) of the Act, which authorizes railroads to enter into voluntary arrangements for through routes and joint rates, to prohibit the Commission from compelling railroads to furnish services to motor carriers.<sup>60</sup>

The district court's holding that Section 3(1) of the Interstate Commerce Act allows the railroads to discriminate against the motor carriers was also rejected. The Court pointed out that:

This is language more notable for its awkwardness than for its clarity; but it certainly was not intended . . . to grant license to discriminate against traffic *offered to the railroad* by another carrier. We have noted above that this Court has

---

<sup>55</sup> Id.

<sup>56</sup> 323 U.S. 612 (1945).

<sup>57</sup> 49 U.S.C. §§ 901-23 (1964), as amended, 49 U.S.C. § 912 (Supp. II 1965-66).

<sup>58</sup> 387 U.S. at 409. The Court quoted from its holding in *United States v. Pennsylvania R.R.*, 323 U.S. at 618-19.

<sup>59</sup> 387 U.S. at 410.

<sup>60</sup> Id. at 410-11.

clearly held that such discrimination is not permissible. Moreover, there is an intelligible meaning which can be ascribed to the proviso and which is consistent with its history. The proviso means that the prohibition against "undue or unreasonable preference or advantage" is not to be construed to forbid practices, otherwise lawful, solely because they operate to the prejudice of another carrier.<sup>61</sup>

In light of the foregoing, the Supreme Court had only to consider the provisions of the Act which require the railroad to perform as common carriers and concluded that the Commission had the requisite authority to promulgate rule 2.

Having discussed the duty of the railroads to perform as common carriers, the Court directed its attention to the validity of rule 3. The railroads had contended that, notwithstanding their duty as common carriers, motor carriers may not be authorized to substitute transportation by rail for the transportation by road which is the basis of their franchise, except with the agreement of the railroad. The Supreme Court rejected this argument, stating:

It is this [contention] . . . that saps the [railroads'] argument of some of its force, if not its fervor. One would assume that if the motor carriers are not authorized by their franchise under the Act to substitute transportation by rail for transportation by road, they could not do so with the consent of the railroads.<sup>62</sup>

The Court noted that the Interstate Commerce Act defines a "common carrier by motor vehicle" as "any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property . . . for compensation . . . except transportation . . . by an express company to the extent that such transportation has heretofore been subject to chapter 1 of this [Act]."<sup>63</sup> The Court further noted that this definition does not exclude voluntary joint arrangements with other carriers, rail or water. Further, these are expressly permitted by Section 216(c) of the Act,<sup>64</sup> so the Court concluded "that the Act cannot be construed to require that the trucker must always transport its cargo exclusively by road."<sup>65</sup>

Reiterating generally the provisions of Part IV of the Interstate Commerce Act regulating freight forwarders,<sup>66</sup> the Court next ad-

<sup>61</sup> *Id.* at 411.

<sup>62</sup> *Id.* at 413.

<sup>63</sup> 49 U.S.C. § 303(a)(14) (1964).

<sup>64</sup> 49 U.S.C. § 316(c) (1964).

<sup>65</sup> 387 U.S. at 415.

<sup>66</sup> 49 U.S.C. §§ 1001-22 (1964), as amended, 49 U.S.C. §§ 1006, 1017 (Supp. II 1965-66). Herein a freight forwarder is defined as

ressed itself to the argument advanced by the freight forwarders. They had contended that the Act authorizes only freight forwarders to engage in the assembly and consolidation of shipments and the subsequent use of rail facilities for transportation and that permitting the motor carriers to engage in this sort of service, by means of TOFC on open-tariff, was to authorize them to engage in this service in violation of the Act's prohibition against licensing other carriers as freight forwarders. The Supreme Court noted, however, that "truckers have also traditionally assembled, consolidated, and distributed cargo in connection with providing their authorized transportation services."<sup>67</sup> Section 402(a)(5) of the Act specifically exempts from the freight-forwarder provisions any person who performs these services as a carrier subject to another part of the Act.<sup>68</sup> The Commission's rules 2 and 3 merely make the utilization of TOFC service available to the motor carrier where offered generally and, as a practical matter, permit the motor carrier to assemble, consolidate, transport by piggyback, and distribute without the prior concurrence of the railroad. The Court, therefore, held that: "The fact that the Commission enlarges this additional possibility of transportation of the truckers' trailers may be a competitive fact of some significance, but it does not convert the truckers into freight forwarders, nor deprive the latter of the exclusive rights specified in the Act."<sup>69</sup>

In reply to the argument that the Commission's prior construction and application of the Act precluded its present position, the Court liberally construed the role of regulatory agencies, stating:

[W]e agree that the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. . . . In fact . . . this kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency.<sup>70</sup>

In conclusion, the Supreme Court declared that "[t]he controlling fact of the matter is that all piggyback service is, by its essential

---

any person which (otherwise than as a carrier [by rail, motor vehicle, or water] . . .) holds itself out to the general public as a common carrier to transport or provide transportation of property . . . and which . . . (A) assembles and consolidates . . . shipments . . . and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a [rail, motor, or water] carrier . . . subject to . . . this title.

Id. at § 1002(a)(5).

<sup>67</sup> 387 U.S. at 419.

<sup>68</sup> 49 U.S.C. § 1002(a)(5) (1964).

<sup>69</sup> 387 U.S. at 420.

<sup>70</sup> Id. at 416.



nature, bimodal.<sup>71</sup> The Court further stated that in the absence of congressional direction, there is no basis for denying the ICC the power to regulate transportation which involves both elements.<sup>72</sup>

There can be little doubt that trailer-on-flatcar service has virtually erased the historic lines of demarcation between modes of transportation, and permits the blending of attributes of both rail and motor service in providing for a transportation system responsive to the needs of the nation. Through exploitation of TOFC service the railroads have been able to avoid the limitations inherent in conventional railroad operations and offer the shippers a service which is predicated upon the door-to-door movement of freight in the same highway vehicle, thus taking advantage of the attributes of motor carriers. As a result, the transportation services of railroads are no longer confined to the steel rail but extend over the streets and highways to the doors of shippers and consignees. Pursuant to the prior decisions of the Commission, the railroads have been able to bar motor carrier use of this bimodal service and have been able to invade, to a substantial degree, the traffic traditionally transported by motor carriers. The Commission in their rulemaking proceeding, sought to give the motor carriers a *quid pro quo* for allowing the railroads to exploit the former's inherent advantages and, further, to eliminate the arbitrary bar to the use of TOFC service exercised at the discretion of the railroads. In doing so, the Commission complied with the mandate of the National Transportation Policy which calls for the "fair and impartial regulation of all modes of transportation subject to the Act."<sup>73</sup>

### III. RULES CONCERNING AND LIMITING MOTOR-RAIL COORDINATED SERVICE

#### A. Rule 4—Joint Intermodal Service

Historically, limits have been placed upon motor-rail coordination and it was necessary for the Commission to assess the effect of these limits in light of its expanded open-tariff conclusions. Rule 4, a by-product of rules 1, 2, and 3, was the result of this assessment and essentially rephrased the legal limits that had been placed on motor-rail coordination.

This joint intermodal service rule finds its source in a long line of Commission decisions and essentially embraces the general rule that a regulated carrier cannot enter into joint rates with an unregulated carrier. Rule 4 provides in part:

---

<sup>71</sup> Id. at 420.

<sup>72</sup> Id. at 421.

<sup>73</sup> National Transportation Policy, 54 Stat. 899 (1940) (inserted before Chapters 1, 8, 12, 13, and 19 of the Interstate Commerce Act).

THE "PIGGYBACK" RULEMAKING CASE

(a) Except as otherwise may be prohibited by these rules, any rail carrier or carriers subject to part I of the act may enter into through-route and joint-rate arrangements with any motor common carrier subject to part II of the act or any water common carrier subject to part III of the act, wherein TOFC service is to be provided either in lieu of, or in addition to, the authorized all-highway or all-water service of such motor or water common carrier.

(b) Motor or water common carriers may participate in joint intermodal TOFC service in lieu of their authorized all-highway or all-water service only if their tariff publications give notice that such service may be provided at their option, but that the right is reserved to the user of their services to direct that in any particular instance such TOFC service not be provided.

(c) Tariffs embracing joint intermodal TOFC rates or charges, including Substituted Service Directories, if used, shall set forth the service covered by the published rates or charges; the points of interchange between modes of transportation; and the names of the carriers participating therein.<sup>74</sup>

The notion that regulated and unregulated carriers cannot enter together into joint rates developed over a long period, and rules 4(a), (b), and (c) expressed the results of previous rulings and cases. These rules follow directly from rule 1 and, with the Supreme Court upholding the validity of rules 2 and 3, emerge as very important concepts. A historical analysis of the developments of these concepts is necessary in order to appreciate its present impact on piggyback service.

1. *Developments Prior to the Motor Carrier Act of 1935.*<sup>75</sup> In the 1897 case of *Cary v. Eureka Springs Ry.*,<sup>76</sup> the defendant railroad sought to enter into a joint rate with a stage line. The ICC ruled that such an arrangement was illegal in a situation where the transportation would be beyond the end of the rail line.

The arrangement between [the railroad] . . . and the Harrison Transportation Company was an attempt to extend their line beyond Eureka Springs . . . and other points in Arkansas not reached by the line or road of the defendants or either of them. . . .

---

<sup>74</sup> 49 C.F.R. § 500.4 (1967); 322 I.C.C. at 351-52.

<sup>75</sup> 49 U.S.C. §§ 301-27 (1964), as amended, 49 U.S.C. §§ 302, 304-05, 308, 312, 314, 322 (Supp. II 1965-66).

<sup>76</sup> 7 I.C.C. 286 (1897).

The provisions of [the Interstate Commerce Act] . . . do not apply to transportation by team or wagon and neither the joint tariffs, nor the arrangement of defendants with the Harrison Transportation Company, made them joint carriers with said Transportation Company, nor carriers at all beyond Eureka Springs.<sup>77</sup>

Eight years later, in *Wylie v. Northern Pac. Ry.*,<sup>78</sup> an arrangement similar to that in the *Eureka Springs* case (also involving a stagecoach line) was again declared unlawful. The Commission held that the defendant railroad was without authority to make traffic agreements either with the transportation company which provided stages for touring Yellowstone Park, or with the association which conducted the hotels there.<sup>79</sup> The ICC believed that the parties were not competent in law to form through routes and to establish joint rates as provided for in Section 6, now Section 6(7), of the Interstate Commerce Act.<sup>80</sup> Further, the tariff under which the rates and tickets in question were provided could not be regarded as a joint tariff established by connecting carriers under the authority of the Act.<sup>81</sup> Section 6(7) provides:

No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property . . . unless the rates, fares, and charges upon which the same are transported . . . have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand . . . a greater or less or different compensation for such transportation . . . or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed . . . nor shall any carrier refund or remit . . . any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.<sup>82</sup>

In *Eureka Springs* and *Wylie*, the Commission had been concerned with the capacity of a given carrier to form through routes and enter into joint rates, this capacity being dependent upon the jurisdiction of the Commission over those carriers. Since Section 6 of the Act dealt with rates of carriers regulated by the Act, any joint rates set up between a regulated mode of transportation and an unregulated mode

<sup>77</sup> Id. at 310-11.

<sup>78</sup> 11 I.C.C. 145 (1905).

<sup>79</sup> Id. at 154.

<sup>80</sup> 24 Stat. 380 (1887), as amended, 49 U.S.C. § 6(7) (1964).

<sup>81</sup> 11 I.C.C. at 154.

<sup>82</sup> 49 U.S.C. § 6(7) (1964).

were invalid for the compelling reasons of lack of jurisdiction and, hence, inability to conform to the provisions of section 6. This was clearly expressed in 1908 when the Commission decided the case of *Cosmopolitan Shipping Co. v. Hamburg-American Packet Co.*<sup>83</sup> This case involved the lawfulness of joint rail-water rates where the water carrier employed ocean-going vessels. The Commission condemned such such joint rates stating:

The Commission, not having been given control over the ocean carriers, can not compel observance of the law by such carriers, and if they so choose they may alter their rates at such times as they please or for such patrons as they please. Therefore the line must be drawn decisively between those carriers whose rates and practices this Commission can control and those which it can not control; and upon this line of reasoning it has been the consistent ruling of the Commission that "joint rates" can not be made between carriers subject to the act and those not subject to the act. *Wylie v. Northern Pac. Ry. Co.* 11 I.C.C. Rep. 145; *Cary v. Eureka Springs Ry. Co.* 7 I.C.C. Rep. 286.

The "joint rate" referred to in section 6 is a "joint rate" made between two or more carriers all of whom are of the classes designated within section 1 as being subject to control and regulation by the Interstate Commerce Commission.<sup>84</sup>

The Commission went further, however, indicating that the above holding was not founded upon an assumption that the Interstate Commerce Act takes from the regulated common carrier any common law right to contract freely with other carriers even though they may not be subject to the Act. According to the Commission's opinion, a rail carrier could control, or connect with, a line of steamships engaged in foreign commerce; could interchange business as freely with such a steamship company as with another rail carrier; could quote a combined rate for the through movement; "[b]ut as to such carriers engaged in foreign business, the rail carrier has, so far as this law is concerned, a purely contractual or proprietary relation, not a relation regulated or controlled in any manner by [the Interstate Commerce Act] . . . ."<sup>85</sup> This same principle was reflected in the Commission's *Conference Ruling 441* of 1913. There the Commission considered drayage, or the carting of goods, in connection with joint tariffs. At that time, drayage was primarily accomplished by wagon train. As a result of its consideration, the ICC held that a drayage firm was not a

<sup>83</sup> 13 I.C.C. 266 (1908).

<sup>84</sup> *Id.* at 280.

<sup>85</sup> *Id.* at 280-81.

proper party to a joint tariff nor was it a carrier under the provisions of the Interstate Commerce Act and, therefore, no tariffs could properly be filed by it. Additionally, the Commission held that:

(a) Where there is an additional transfer or drayage charge in connection with a through shipment, the carriers' tariffs must specify what that charge shall be.

(b) If such drayage or transfer charge is absorbed, in whole or in part, by a carrier, the tariffs must show the amount of such transfer charge that will be absorbed.

Summarizing these cases, it appears that the distinction between that which was allowed by the Commission and that which was not was, respectively, a tariff by the regulated carrier which indicated any additional charge made in respect of a through route limited to the regulated carrier's authorized route, and a joint tariff whereby the nonregulated carrier might hold out the service and the through route might be extended by the nonregulated carrier.

The holdings in *Conference Ruling 441* and the *Hamburg Packet* case formed the basis for an investigation into cartage, this time involving primarily motor carriers. The report of the Commission, entitled *Tariffs Embracing Motor-Truck or Wagon Transfer Service*, appeared in 1924.<sup>86</sup> As indicated by the Commission in the introduction to its report, this investigation concerned the legality of schedules contained in the tariffs

wherein motor-truck or wagon transfers are employed to perform any portion of the transportation service either within or between defined terminal districts, between defined terminal districts and interior points, or between interior points, in connection with carriers by rail, water, or rail-and-water routes, subject to the interstate commerce act.<sup>87</sup>

The use of truck or wagon transfers by the carriers generally fell into one of three categories: (1) use in connection with terminal services within terminal districts; (2) use in connection with transfer in transit between rail carriers at an intermediate point; and (3) use in connection with hauls extending beyond terminal districts, commonly designated as line-hauls.

The character of this third category was demonstrated by the Starin-New Haven situation. The Starin-New Haven Line was a water carrier operating between New Haven and New York where it connected with the Clyde Steamship Company and the Mallory Steamship Company, also water lines. The Clyde lines published joint water-and-

<sup>86</sup> 91 I.C.C. 539 (1924) (hereinafter cited as *Tariffs Embracing Transfer Service*).

<sup>87</sup> *Id.* at 540.

rail rate tariffs from New Haven and New York to interior points in southern territory in connection with southern rail carriers serving southern Atlantic and Gulf ports. These tariffs were concurred in by the Starin-New Haven Line and the southern rail carriers. The Starin-New Haven was in competition with the New York, New Haven and Hartford Railroad, which had established routes from interior New England points and had refused to join with the Starin-New Haven Line in the publication of joint rates from these interior points. The water carrier, therefore, was essentially forced into making agreements with two private trucking concerns to operate a trucking service from four interior points to New Haven. The truck companies were not shown in the tariffs as originating or participating carriers and the amounts paid them were likewise not shown.

In discussing the legality of the tariffs involved in this situation, the Commission referred to Section 1(1) of the Interstate Commerce Act, which states that: "The provisions of this chapter shall apply to common carriers engaged in—(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment . . . ."<sup>88</sup> The Commission then concluded that the local service of the Starin-New Haven Line between New Haven and New York was not subject to its jurisdiction but that the joint rates of the water carrier and the Clyde lines and southern rail carriers were under its jurisdiction.<sup>89</sup> The question then became whether or not the service in connection with such joint rates could be lawfully extended to the New England interior points in the manner attempted. The ICC concluded that it could not.

The hauls by motor truck from the four inland points to the Starin-New Haven docks at New Haven cannot be said to be transportation over which we have jurisdiction or a service that can be required of a common carrier. The trucking company cannot, under those conditions, be acting as an agent for a common carrier. As stated, a trucking company is not a carrier subject to the provisions of the act. Consequently the trucking company is not a proper party to a joint tariff. *Conf. Ruling 441*.<sup>90</sup>

The Commission went on to point out:

While there is no express prohibition in the act against the publication of joint rates in connection with a common carrier not subject to the act, we have consistently held that

---

<sup>88</sup> 49 U.S.C. § 1(1) (1964).

<sup>89</sup> 91 I.C.C. at 548.

<sup>90</sup> *Id.*

the line must be drawn between those carriers whose rates and practices we can control and those which we cannot control; and upon this line of reasoning it has been our ruling that joint rates cannot be made between carriers subject to the act and those not subject to the act. *Cosmopolitan Shipping Co. v. Hamburg-American Packet Co.*, 13 I.C.C. 266. The law, however, does not prohibit either a rail or water carrier subject to the act from interchanging business with motor trucks and entering into proper arrangements to acquaint the shipping public with the total charges for the full movement. But such arrangements are not required by law and the fact that they may be entered into does not extend the terms of the act to include the motor-truck service. Section 6 requires that the charges for the service subject to the act be filed with us, which requirement we have always construed as making necessary the statement in the tariffs of such charges separately from other charges not subject to the act.<sup>91</sup>

It should be noted that the Commission apparently places reliance on the form of section 6 rather than on the substantive concept of extension of a regulated carrier's service which was relied on in the *Eureka Springs* case.

In *Tariffs Embracing Transfer Service*, the Commission also gave examples of the other two types of service performed by motor trucks for regulated carriers, namely, that used in connection with terminal services within terminal districts, and that used in connection with transfer in transit between rail carriers at an intermediate point. Of particular significance is the former service which was discussed in regard to the *St. Louis Terminal Case*.<sup>92</sup> In brief, the situation was that some carriers operating under joint rates had terminal facilities located both in St. Louis, Missouri and in East St. Louis, Illinois, separated only by the Mississippi River. An arrangement was made with certain trucking companies to transport the freight across the river between terminals. The trucking companies would issue bills of lading and collect freight charges as agents for the carriers. In that case, the Commission found the performance of this delivery service to be lawful.<sup>93</sup> The Commission probably relied, although it is not clearly apparent, on Section 1(3)(a) of the Interstate Commerce Act.<sup>94</sup> This section, after defining the term common carrier as including public service

<sup>91</sup> Id. at 548-49.

<sup>92</sup> 34 I.C.C. 453 (1915). The use of trucks in connection with transfers in transit is discussed in *Tariffs Embracing Transfer Service*, 91 I.C.C. at 543-44.

<sup>93</sup> 34 I.C.C. at 462.

<sup>94</sup> 49 U.S.C. § 1(3)(a) (1964).

## THE "PIGGYBACK" RULEMAKING CASE

companies of various species, among which motor-truck or wagon transfer companies are not mentioned, states:

The term "railroad" . . . shall include all bridges, car floats . . . used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all . . . tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein . . . . The term "transportation" . . . shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract . . . and all services in connection with the receipt, delivery, elevation, and transfer in transit.<sup>95</sup>

It is evident, therefore, that joint rail-motor rates involving purely terminal cartage were allowed though motor carriers were still not subject to regulation.

In *Trucking Less-Than-Carload Freight in Lieu of Rail Service in Chicago District*, decided in 1932,<sup>96</sup> the Commission stated:

We have held that motor-truck or wagon-transfer companies are not carriers subject to the act, that line-haul service performed by them is not transportation subject to the act, but that motor-truck or wagon-transfer service performed in connection with terminal services by a rail carrier is subject to our jurisdiction. *Tariffs Embracing Motor-Truck or Wagon Transfer Service*, 91 I.C.C. 539. When a motor-truck service between freight houses within the same terminal district is performed in interstate commerce by a carrier subject to our jurisdiction, the extent of the service and the rates therefor must be published in tariffs filed with us.<sup>97</sup>

It seems certain, therefore, that the Commission construed Section 1(3) of the Act as including terminal services by motor carrier within "railroad transportation." The *Trucking L.C.L.* case was a forerunner of what, today, is called substituted service.

2. *Developments Subsequent to the Motor Carrier Act.* Subsequent to the introduction of ICC regulation of motor carriers under Part II of the Interstate Commerce Act, the *Hamburg-Packet* rule that

---

<sup>95</sup> Id. While the Commission cited this section and quoted the definitions after its discussion of the *St. Louis Terminal Case* and during its discussion of the Starin-New Haven situation, it seems reasonable that it had this section of the Interstate Commerce Act in mind at the time it rendered its decision in the former case.

<sup>96</sup> 185 I.C.C. 71 (1932).

<sup>97</sup> Id. at 72-73.



joint rates cannot be entered into by regulated and unregulated carriers has been the law for motor-rail joint rates.

In piggyback service there are two plans which are joint-rate arrangements, namely, plans I and V. In *Ex Parte 230*, under the topic Joint Intermodal Service, the Commission devoted most of its time to equating plan I with plan V. TOFC plan I, which is known as "substituted service," evolved from a famous decision entitled *Substituted Freight Service*.<sup>98</sup> There the Commission said that

either the rail carrier must have authority to engage in common carriage by motor vehicle in its own right, or the motor carriers joining in such service must be authorized to act as such carriers in their individual capacities. In either event, where the substitution service consists of a combination of line-haul movements by rail and motor, it is in legal effect a joint service, no matter by what other name it may be designated.<sup>99</sup> (Footnote omitted.)

In the 1954 case of *Movement of Highway Trailers by Rail*,<sup>100</sup> which formed the basis for several points in TOFC service, the Commission hedged on the problem of regulated-unregulated joint rates, but did conclude that trailer-on-flatcar service was a rail move. The major question in that case, however, was whether: "As between a railroad and a motor common carrier whose loaded and empty trailers are moving in the railroad's trailer-on-flatcar service . . . the relation [is] that of connecting carriers . . . where the arrangement is for other than substituted rail-for-motor service[.]"<sup>101</sup> The Commission's answer was hardly responsive as it stated:

Although the railroads are under no obligation to police the operations of motor carriers with respect to their certificates, we believe that, when they enter into joint-rate arrangements with such carriers, they should satisfy themselves that the motor carriers have authority to operate with respect to the commodities concerned between the points where the substituted service is performed.<sup>102</sup>

By failing to answer the specific question posed, the Commission missed an opportunity to solve some fundamental issues.

In *Ex Parte 230*, the Commission held that substituted service (plan I only) involved joint rates as did plan V and that both of these fundamental types of coordinated piggyback service were lawful

<sup>98</sup> 232 I.C.C. 683 (1939).

<sup>99</sup> *Id.* at 687-88.

<sup>100</sup> 293 I.C.C. 93 (1954).

<sup>101</sup> *Id.* at 105.

<sup>102</sup> *Id.* at 107.

through-route arrangements.<sup>103</sup> The Commission described plan I as providing

for the "substitution" of rail for motor service at rates which are the equivalent of corresponding all-highway rates published by the participating motor carrier. A motor Substituted Freight Service Directory provides reference to the concurrence of the rail carrier and the points between which the substitution may be made, and such information is incorporated into the governing rate tariff by an appropriate tariff rule which preserves the shipper's right to direct that such substitution not take place.<sup>104</sup>

With respect to plan V, the Commission pointed out that

rail-motor, motor-rail, or motor-rail-motor services are provided under joint rates which are generally published in a tariff separate and distinct from other tariffs maintained by the participating regulated common carriers and which are applicable only over the through route or routes. There is no question but that a motor common carrier may, under an appropriate plan V tariff, interchange traffic with the participating railroad at an authorized service point short of the full length of its authorized operations, and later receive such traffic back again for movement between other of its authorized points of service. In such an operation, of course, the rail carrier's physical participation in the through movement is as a "bridge" carrier and is substantially similar to that present in a plan I operation.<sup>105</sup>

The net result of the plan I and plan V conclusions was to allow only motor common carriers subject to Part II of the Act to participate in plan I service arrangements and to preclude such participation by contract carriers as well as by unregulated carriers generally.<sup>106</sup> This result is, in turn, the basis of rules 4(a), (b), and (c).

---

<sup>103</sup> 322 I.C.C. at 342. It is not clear why all TOFC, as opposed to only that involved in plan I, should not be included.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* The Commission stated:

The fundamental distinction between plan I and plan V operations, as we see it, is that rail and motor carriers serving different areas may combine their service in plan V operations to perform a through service between origin and destination. Another difference is that the tariff rules covering the rendition of plan I service specifically embrace a holding out by the motor carrier to perform an all-highway service at the election of the shipper, whereas the rates provided in plan V joint tariffs are applicable only over the joint intermodal route. In substance, then, plan I merely embraces a simplified form of tariff publication . . . .

*Id.* at 349.

<sup>106</sup> *Id.* at 350.

Rule 4(d), which does not part with established practice, requires that "[c]arriers participating in joint intermodal TOFC service shall interchange traffic only at a common point of service."<sup>107</sup> Rule 4(e) involves the issue of whether substituted service could embrace the entire line-haul.<sup>108</sup> The basic problem seemed to center on the fact that if substitution were made the motor carrier would be performing only terminal functions. This, in turn, would make such a motor carrier appear to be engaged, not in line-haul functions, but in freight-forwarding functions. The two functions are regulated under Parts II and IV of the Act, respectively, and freight forwarding operations are, by express declaration in Section 202(c)(2) of the Act, not subject to Part II under which motor carriers are authorized to enter into joint rates.<sup>109</sup> Substitution for the entire line-haul was, however, allowed by the ICC. The Commission reasoned that whenever joint intermodal TOFC service was to be provided in lieu of an authorized all-motor operation, it was the motor carrier, and not the line-haul railroad, which was the primary carrier and which gave the terminal operations color under the law.<sup>110</sup> In other words, it seemed clear that in such circumstances the collection and delivery services performed by a motor carrier within terminal areas were part and parcel of that motor carrier's authorized line-haul highway service and were to be regarded and regulated as such.

Another Commission rule concerns the commodities with respect to which tariffs may be published. Rule 4(f) states: "Tariffs setting forth through rates or charges for joint intermodal TOFC transportation may be published only with respect to commodities the transportation of which is subject to economic regulation throughout the entire movement provided for in such tariffs."<sup>111</sup> This rule rests on the broad conclusion, drawn by the Commission in *Ex Parte* 230, that

should a motor carrier file with the Commission a tariff which by its terms might appear to cover exempt transportation (for example, a rate on "foodstuffs," a generic description which

---

<sup>107</sup> 49 C.F.R. § 500.4(d) (1967). This rule also relates to rule 3(e) which provides that "[m]otor and water common and contract carriers utilizing open-tariff TOFC service in the performance of authorized transportation shall tender traffic to and receive traffic from rail carriers only at points which the motor and water carriers are authorized to serve." 49 C.F.R. § 500.3(e) (1967); 322 I.C.C. at 355.

<sup>108</sup> 49 C.F.R. § 500.4(e) (1967).

Where joint intermodal TOFC service is to be performed in lieu of a motor or water carrier's authorized all-highway or all-water route, tariffs embracing rates or charges covering such service may provide for the performance of TOFC service for the entire line-haul movement.

322 I.C.C. at 361.

<sup>109</sup> 49 U.S.C. § 302(c)(2) (1964).

<sup>110</sup> 322 I.C.C. at 360.

<sup>111</sup> 49 C.F.R. § 500.4(f) (1967); 322 I.C.C. at 354.

would include many unprocessed agricultural commodities), it would nevertheless not be bound to charge the published rate, and the Commission would have no authority to compel it to do so. The corollary to this proposition, which is equally true, is that with regard to transportation for which the Commission cannot compel compliance with tariff publications, a carrier cannot publish with the Commission a tariff which can be recognized by it in any way. The upshot of the matter is simply that there is no way in which a motor or water carrier can publish an effective rate covering transportation not subject to the Commission's economic regulation. It must follow that an attempted joint rate covering such transportation is equally abortive, for where one party to an alleged through rate is under no obligation to collect the stated charges, the rate itself can be of no force and effect.<sup>112</sup>

*B: Circuitry Limitations Placed on Motor Carrier Use of TOFC*

A problem which had confronted the Commission for a number of years was presented whenever a motor carrier, authorized to operate between two given points over a circuitous route, attempted to use, in lieu of its all-highway service, the TOFC service of a railroad whose lines provided a more direct routing between the terminals. This issue had arisen because motor carriers, whether operating over regular or irregular routes, are ordinarily limited as to the points they can serve and the manner in which they can operate between them. A regular-route motor carrier is restricted to operation over certain highways, and as its business expands and its operating authority increases on a piecemeal basis, it is likely to find itself with authorized routes between certain points which are not the most direct available. An irregular-route motor carrier is apt to find itself engaged in circuitous operations only if it combines two or more grants of authority at common service points in order to provide through transportation. Should a motor carrier be able to secure a substantially more direct route through the use of piggyback service, the purposes of the ICC-imposed route limits would be negated.<sup>113</sup>

In line with the fundamental policy established in rules 2, 3, and 4, the Commission resolved this circuitous route problem by directing, in rule 5, that:

---

<sup>112</sup> 322 I.C.C. at 352-53. The Commission's conclusion and the resulting rule 4(f) derive basically from Section 216(c) of the Interstate Commerce Act, 49 U.S.C. § 316(c) (1964), which, as the Commission states, "contains no provision for the participation in such rates by carriers not subject to the Commission's economic jurisdiction." 322 I.C.C. at 354.

<sup>113</sup> For a general discussion of circuitry limitations, see 322 I.C.C. at 361-64.

(a) Motor and water common carriers shall not participate in joint intermodal TOFC service which is to be provided in lieu of their authorized line-haul transportation, and motor and water common and contract carriers shall not utilize open tariff TOFC service, where the distance from origin to destination over the route including the TOFC movement is less than 85 percent of the distance between such points over the motor or water carrier's authorized service route: *Provided, however*, That the Interstate Commerce Commission may grant relief from the provisions of this paragraph upon consideration of an appropriate petition.<sup>114</sup>

The railroads sought to have the District Court for the Northern District of Illinois, in the *Sante Fe* case, declare the invalidity of this rule. While the court felt that the rule was not without rational foundation, it found that insofar as rule 5 related to open-tariff service, it must fall with rules 2 and 3.<sup>115</sup> With the Supreme Court upholding the validity of rules 2 and 3, rule 5 is restored.

#### C. *Placing and Securing Trailers—A Railroad Responsibility*

While not strictly a limitation upon intermodal service, rule 6 imposed upon the railroads the duty of securing motor-carrier trailers upon the flatcars. Under these safety measures, however, the railroads were granted the right to refuse trailers which did not conform to Commission-prescribed safety regulations.<sup>116</sup> The railroad was also required to ramp and deramp the trailer (load and unload the flatcar), unless a tariff provision was published by the railroad to relieve it of this responsibility.

#### D. *Billing, Notification, Tariffs and Trailer Leasing— The Housekeeping Rules*

1. *Billing and Notification—Rule 8.* Before turning to the more important rule 7, concerning tariff publication and trailer leasing, it is

<sup>114</sup> 49 C.F.R. § 500.5(a) (1967); 322 I.C.C. at 364.

<sup>115</sup> *Atchison, T. & S.F. Ry. v. United States*, 244 F. Supp. 955, 970 (N.D. Ill. 1965).

<sup>116</sup> (a) Railroads participating in TOFC service shall assume responsibility for the safe securing of highway trucks, trailers, or semi-trailers (or the demountable container portion thereof) on the rail cars when moving over their lines; and, unless otherwise provided for by tariff, or in the case of connecting common carriers by agreement, railroads shall also assume responsibility for the safe placing of highway trucks, trailers, or semi-trailers (or the demountable container portion thereof) on rail cars and for removing them from rail cars.

(b) Railroads participating in TOFC service have the right to refuse to accept for transportation in such service any highway trucks, trailers, or semi-trailers (or the demountable container portion thereof) which do not conform to the motor carrier safety regulations prescribed by the Commission.

49 C.F.R. § 500.6 (1967); 322 I.C.C. at 367.

## *THE "PIGGYBACK" RULEMAKING CASE*

well to consider some of the questions which arose from, or were allied with, the unique operational aspects of piggybacking. The railroads did not want to use this new concept merely to shift existing carload traffic into a trailer. They therefore constructed the TOFC rates so as to place a premium upon trailers that were not completely loaded with one commodity. To do this, they provided incentive rates for a trailer which contained not more than a specified percentage, usually 60 percent, of one commodity. Thereby the carload commodity traffic would be less likely to be diverted to piggyback. To enforce the content mixture rule, the railroads either required certification or asked the shipper to provide a manifest of the shipment.

Since rates are traditionally based upon the weight of the commodity being moved, some system had to be devised to ascertain TOFC weights. This was especially difficult with respect to plan III operations, where the railroad service was ramp-to-ramp, and the delivery and pickup was performed by the shipper or freight forwarder. The railroads realized that because of operational difficulty and a lack of weighing facilities, they could not require the shipper to weigh the trailer. To do so would have completely stunted the growth of TOFC service. Most railroads solved the problem by requiring the shipper to certify the weight of each individual shipment.

While these two certification policies, mixture of content and weight, were practical solutions to the problems, it was felt that standardization was necessary to eliminate the possibility of harm to shippers through the use of discriminatory practices by different railroads using different rules. To achieve this standardization, the Commission proposed rules which were, theoretically, the most complete solution to the problem. Weight and content certifications were to be made by the shipper prior to the time the railroad commenced transporting the shipment. The rules would be clear and there would be no possibility for discriminatory application. No move would be made until certification had been received.

While there was no real opposition by the railroads or shippers to the idea of having rules respecting billing practices, there was much dissent regarding the requirement that certification or a manifest be tendered before the shipment moved. One added sore point was the proposed requirement that a bill of lading be issued prior to transportation of the shipment. The rulemaking proceeding had produced evidence of delay by rail carriers in issuing bills of lading. The consequence of such premovement-documentation requirements would have been quite serious to piggybacking. The speed and flexibility which had been its hallmark would end as trailers sat loaded for movement but waiting for the processing of paperwork. The ICC's examiners recognized this problem and revised the rules to eliminate some of the stringency of prior

documentation. The bill-of-lading requirement was changed to require the "prompt" issuance of "either a receipt or a bill of lading" for the shipment.<sup>117</sup> This conformed with Section 20(11) of the Interstate Commerce Act which provides that a railroad shall, upon receipt of property, issue a receipt or bill of lading.<sup>118</sup> It was also in accord with the manner in which carload shipments had traditionally been handled.

To further ease the premovement-documentation requirements, the examiners provided that where a manifest was used by the shipper, it could be presented to the originating carrier not later than 24 hours after the shipment reached the destination ramp. Weight certification was to be made, however, at the time the trailer was tendered to the originating carrier.<sup>119</sup>

The Commission adopted, as rule 8(a), the examiners' recommendation regarding the requirement for a receipt or bill of lading<sup>120</sup> but modified the examiners' recommendations concerning weight and content certification in a significant respect. The ICC's rule 8(b) requires a shipper to deliver a manifest only where rates are contingent upon weight or content, and in such a case the manifest or certification shall be given the originating carrier within 24 hours after the shipment reaches its destination.<sup>121</sup> Further flexibility was thereby built into the requirements since a load would not have to wait for paperwork before being transported. However, an important restriction was designed to protect the railroads. Where weight is necessary to compute charges, the destination railroad must retain possession of the trailer until shipper certification is received or it has itself ascertained the weights.

In its rule 8(e) the Commission, without any exceptions having been taken by the parties, expanded the examiners' requirement for tariff clarity in the commodity-mixture rule.<sup>122</sup> The Commission affirmed the examiners' proposal for tariff requirements which stated clearly and explicitly the terms of such rates but added the further tariff requirements: that "articles" be defined in the tariff or by reference to the Uniform Freight Classification (U.F.C.); that the required shipper certification show the percentage of weight of a given article to the weight of the entire shipment; and that the railroads provide a rate to apply if a shipment fails to qualify for the lower mixture rate.<sup>123</sup>

While the latter two requirements are largely procedural, the first

---

<sup>117</sup> 322 I.C.C. at 373.

<sup>118</sup> 49 U.S.C. § 20(11) (1964).

<sup>119</sup> For a more detailed discussion of pre-rule billing and notification practices and the Commission's proposed rules, see 322 I.C.C. at 372-80.

<sup>120</sup> 49 C.F.R. § 500.8(a) (1967); 322 I.C.C. at 373.

<sup>121</sup> 49 C.F.R. § 500.8(b) (1967); 322 I.C.C. at 376.

<sup>122</sup> 49 C.F.R. § 500.8(e) (1967); 322 I.C.C. at 380.

<sup>123</sup> *Id.*

mentioned requirement is of significance to many shippers. The rule, as proposed at the commencement of the proceedings, would have defined commodities under the mixture rule by reference to the commodity descriptions in the Uniform Freight Classification. The shippers, whose products are listed under a single item, e.g., fresh meat, though in the trade products receive more specific classification, e.g., ribs, ham, etc., contended that using the U.F.C. as a guide would greatly impede their use of these rates. The examiners agreed with this contention and found the U.F.C. an inappropriate indexing of commodities. The Commission, while not disagreeing with this conclusion, did feel that there was sufficient need for definite and ascertainable commodity definitions so that the railroads should be under explicit compulsion to frame a rule. Recognizing the difficulties with the U.F.C., the Commission required reference to "a commodity classification, such as the current Uniform Freight Classification or a designated tariff . . ."<sup>124</sup> At this writing the railroads are in the process of compiling a definitional tariff to alleviate the problems involved in using U.F.C. and yet to comply with the Commission's rule.

The examiners' proposed rule 20B would have required shipper certification that trailers contained no prohibited commodity or any explosive or dangerous article.<sup>125</sup> In proposed rule 22 the related requirement was imposed that where explosives or other dangerous articles were being tendered the shipper must certify that he has complied with the Commission's regulations on explosives and dangerous articles. The Commission adopted this latter rule.<sup>126</sup> In addition to the certification requirement, the rule requires the shipper to advise the carrier in advance of such dangerous shipment so that the carrier can place warning placards on the trailer and properly position it in the train.<sup>127</sup> The Commission then struck the portion of rule 20B requiring certification that there was no dangerous or prohibited commodity, as unnecessary.

Providing equipment for the rapidly expanding piggybacking operations had become a real problem. Ordinary flatcars were adapted for trailer loading, but proved ineffective. New and longer cars were built which would hold two trailers and it therefore made good economic sense to offer the shipper a rate incentive to tender two trailers at a time destined for the same terminal point. However, as piggybacking grew, the railroads became less concerned with a need to place two

<sup>124</sup> Id.

<sup>125</sup> The reference to prohibited commodities is to items which the railroads had by tariff refused to haul. These are not items which by statute or regulation the railroads cannot haul. This being the case, the Commission felt no need for the formality of a rule and believed the carriers could best police their own tariff prohibitions. 322 I.C.C. at 376.

<sup>126</sup> 49 C.F.R. § 500.8(d) (1967); 322 I.C.C. at 378-79.

<sup>127</sup> Id.



trailers on each car.<sup>128</sup> They needed operational flexibility to load an increasing volume of trailers. As a practice, they were loading trailers in the order in which they were received, and a two-trailer shipment might be split between different trains and even different days. This practice was operationally justified since it would have been senseless for the railroads to gear their loading operations to the arrival of second trailers. It became apparent that a uniform rule was necessary in order to avoid discrimination in the handling of trailers.

The rule proposed by the Commission would have required that the two trailers be tendered on the same day for a shipper to qualify for the incentive rate. It also made such incentive rates available to motor carriers as well as shippers. The motor carrier provision was struck by the examiners in accord with their belief that the Commission lacked the necessary authority to require the railroads to provide such service to motor carriers. The rule was further changed by the examiners to define the time span for tendering multiple trailers as that stated in a tariff, but not to exceed one calendar day.

In the final analysis, the Commission felt that the one-calendar-day provision was too restrictive for the rail carriers. It modified the rule to state that "[u]nless a rail carrier by appropriate tariff publication specifically provides otherwise . . .," the multiple trailers must be tendered within one calendar day.<sup>129</sup> The Commission thus refused to accept the position of the motor carriers that the two trailers must be tendered simultaneously. The truckers had argued that the only justification for incentive rates was the cost-saving of handling a multiple trailer shipment rather than a single trailer shipment. Without simultaneous tendering, no cost-saving could occur. Therefore, the rule had to require simultaneous tendering or be unreasonable. The Commission concluded that this investigation was not a proper proceeding "to issue a general condemnation of volume rates applicable to TOFC shipments."<sup>130</sup> Any future attack upon such incentive rates will have to be directed against an individual rate item with specific attention to the costing and compensative aspects of that rate.

The billing and notification rules adopted by the Commission appear to be generally acceptable in the transportation industry. Realistic certification rules for mixture content and weight, by avoiding the

<sup>128</sup> The examiners suggested that the time may well have arrived when there was no further economic or operational need to base rates on a two-trailer incentive. This would appear correct with respect to operations between major terminals. There may still be a need, however, for the two-trailer incentive with respect to freight originating in smaller communities.

<sup>129</sup> 49 C.F.R. § 500.8(c) (1967). The Commission in its discussion of this rule did not deal with the examiners' conclusions that such rates could not be made available for motor carriers. However, in light of the Commission's open-tariff rule 3, multiple trailer rates are available to motor carriers. See 322 I.C.C. at 376-78.

<sup>130</sup> 322 I.C.C. at 378.

prior-to-movement certification, have retained the desired flexibility without sacrificing the need for truthful reporting of the information. Prescribing a definitional system to apply to the commodity mixture rule will alleviate confusion and achieve an ascertainable standard to guide the parties. And while some doubt has been cast upon the validity of two-trailer rates, the concept has, by dicta and the formality of a Commission rule, become more firmly established in the TOFC picture.

2. *Tariff Publication and Trailer Leasing—Rule 7.* As piggyback operations burgeoned, another important aspect of the equipment problem was the need for trailers. This was especially critical in plan III, under which the shipper was required to provide his own trailer. Shippers did not want to commit capital or enter long-term leases in order to provide the necessary trailers. They were equally unwilling to stand the risk of backhauling an empty trailer. The obvious solution was the trip-lease of a railroad-provided trailer. The potential danger in such private lease arrangements was that of favoritism to selected shippers. The Commission's proposed solution was to forbid any railroad leasing of trailers to shippers, but this met with nearly unanimous opposition from both the railroads and the shippers. The examiners consequently rejected the prohibition as unwise and as one which would have sharply curtailed the growth of plan III. Instead, they aimed their rule at preventing discriminatory evils and required all leasing arrangements to be published in open tariffs containing all rates, rules and charges in clear and explicit terms. The Commission incorporated this provision in its rule 7(a).<sup>131</sup>

The imposition of a tariff-publication requirement was used as a solution to another TOFC problem. In the development of this new piggyback concept no sharp lines had been drawn as to the extent or scope of the service provided. Plan II was thought of as a complete railroad service at a higher cost, while plan III was thought of as a limited service at a bargain cost. Actually, however, services other than mere ramp-to-ramp rail transport were being afforded plan III shippers. The loading and unloading of plan III trailers by the railroads, as an example, had the effect of expanding the service offered under the lower plan III rates. Even plan II shippers were seeking a broader scope of service under the rates provided. For example, they asked for the delivery of plan II trailers to and from plant sites located long distances from the terminal, thereby expanding the railroad service beyond that intended for plan II. Other problems concerning the scope of service were: (1) a failure by the railroads to assess demurrage on shipper-provided trailers; (2) a lack of definition and prescription of charges for the various services auxiliary to line-haul transportation;

<sup>131</sup> 49 C.F.R. § 500.7(a) (1967). For a complete discussion of the proposed rules and the Commission's considerations regarding rule 7, see 322 I.C.C. at 367-72.

and (3) an ill-defined or nonexistent railroad-allowance system covering payment to shippers for the TOFC transportation facilities they furnished.

Rule 7 uses the tariff requirement approach to all of these problems. It requires the carriers to publish rules, regulations and charges in open tariffs for: (1) carrier leasing of trailers; (2) services not included in the rate; (3) leasing of empty trailers from shippers; (4) paying allowances to shippers for furnishing services or instrumentalities included in the rate; (5) defining the geographical area in which pick-up and delivery will be performed; (6) specifying the extent to which loading and unloading will be done; and (7) requiring demurrage and storage against shipper trailers. The addition of a requirement for tariff publication of the compensation to be paid when a carrier leases a shipper's empty trailer is one change of particular interest to shippers.

The rule adopted differs in important respects from the plan originally proposed and closely follows the recommendations of the examiners. As mentioned, the Commission had proposed the total abolition of trip-leasing. It also would have required the railroads to publish TOFC rates that would either include pick-up and delivery or be limited to service between designated railroad terminals when all service and equipment is provided by the railroads. This latter proposal was vigorously opposed and depicted as an unnecessary restriction upon TOFC development. It was felt that it would tie TOFC service to rigid prescriptions which would nullify its most basic attraction, namely, flexibility. Further, it was feared that the rule would end plan III service. This would result from the rule's requirement that the rates either include pick-up and/or delivery or provide all equipment and services. If every TOFC all-rail plan had to fall into one or the other of those rate categories, there would be no plan III.

The examiners agreed with the railroad and shipper opponents of this rule. They specifically found that it was unreasonable and not in the public interest. Two rules discussed by the examiners were designed (1) to require the railroads to provide the designated service, and simultaneously, (2) to provide that whatever part of that service was supplied by a shipper would be compensated through a published tariff allowance. The motor carrier interests favored this approach and contended that Sections 1(3) and 1(4) of the Interstate Commerce Act required the railroads to provide a complete service.<sup>132</sup> They further contended that section 6(1) requires that rates be definite and certain

<sup>132</sup> 49 U.S.C. § 1(3) (1964); 49 U.S.C. § 1(4) (1964). The motor carriers would have liked the rule to have been further tightened so that with respect to a given commodity, with full equipment and service provided between two points, the carriers could offer either all-inclusive rates or terminal-to-terminal rates, but not both.

and that only through the complete service concept could the railroads comply with this requirement.<sup>133</sup> After publishing the complete rate, the railroads can then enumerate specific allowance payments to be made to shippers who provide any part of this complete service. Such a system would also accord with section 15(13) which was designed to cover the payment of all allowances by a rail carrier.<sup>134</sup>

The crux of this contention is, of course, that the railroads are obligated under the Act to provide a complete service. Complete TOFC service would, the motor carriers argued, include everything from the loading of a railroad-provided trailer to its unloading at destination. This contention, however, had been dealt with by the Commission in *Eastern Cent. Motor Carriers Ass'n v. Baltimore & O.R.R.*,<sup>135</sup> affirmed *sub nomine Cooper-Jarrett, Inc. v. United States*,<sup>136</sup> where the three-judge district court said:

The requirements of the Act are that the carrier must hold itself out to furnish the facilities of transportation. It is not required to furnish facilities to pick up and deliver, unless it holds itself out to do so. When it does so, it may make a reasonable charge therefor. Such additional service for such additional charge then becomes available to all who request it and are willing to pay for it.

If the carrier wishes to initiate a lesser service for a lesser price, it may do so.<sup>137</sup>

The Commission correctly agreed with the examiners that the holding in *Eastern Central* was dispositive of the contentions being advanced in this *Ex Parte 230* rulemaking proceeding. Since the issue was one of statutory interpretation and no new factual contentions were being raised by the motor carriers, the Commission was correct in relying upon its prior decision as affirmed by the Court.<sup>138</sup>

It can fairly be concluded that these tariff regulations and leasing rules were necessary and desirable. The very heart of the Interstate Commerce Act and the system of railroad regulation is the nondis-

<sup>133</sup> Section 6(1) of the Act provides in part that:

Every common carrier subject to the provisions of this chapter shall file with the Commission . . . schedules showing all rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier . . . when a through route and joint rate have been established.

<sup>49</sup> U.S.C. § 6(1) (1964).

<sup>134</sup> 49 U.S.C. § 15(13) (1964).

<sup>135</sup> 314 I.C.C. 5 (1961).

<sup>136</sup> 226 F. Supp. 318 (W.D. Mo.), aff'd per curiam, 379 U.S. 6 (1964).

<sup>137</sup> *Id.* at 324.

<sup>138</sup> See 2 K. Davis, *Administrative Law* § 18.11 (1958).

criminary, even-handed treatment of shippers. As the Supreme Court declared in *United States v. Baltimore & O.R.R.*:<sup>139</sup>

The Interstate Commerce Act is one of the most comprehensive regulatory plans that Congress has ever undertaken. The first Act, and all amendments to it, have aimed at wiping out discriminations of all types . . . and language of the broadest scope has been used to accomplish all the purposes of the Act.<sup>140</sup>

Given this background, it is beyond question that the Commission could not tolerate a situation where private arrangements were made between shippers and carriers. Since both the trailer-leasing prohibition and the restrictive definition aspects of the originally proposed rules were eliminated, the resulting rules will benefit shipper and carrier alike. All aspects of TOFC service will be known and subject to the tariff protection built into the Act. With such certainty and knowledge, both carrier and shipper can reach sounder judgments respecting their individual transportation problems.<sup>141</sup>

3. *Judicial Consideration of Rules 7 and 8.* The opinion of the district court in the *Santa Fe* case devoted almost all of its attention to the validity of rules 2 and 3.<sup>142</sup> Undoubtedly, these so-called open-tariff provisions were the most controversial product of the *Ex Parte* 230 proceedings, and deservedly received the closest consideration. The railroads, in their complaint before that court, had questioned only two other of the Commission's rules. They objected to the circuitry provisions of rule 5(a), and also to rule 7(a), which required the railroads to lease trailers to TOFC users in accord with published tariff provisions. The railroads had urged that this latter rule was arbitrary, ambiguous and beyond the Commission's power. They particularly complained about the reach of the rule to the leasing by a noncarrier railroad subsidiary or affiliate.<sup>143</sup>

<sup>139</sup> 333 U.S. 169 (1948).

<sup>140</sup> *Id.* at 175.

<sup>141</sup> The carriers themselves recognized the need for nondiscriminatory treatment of shippers and had commenced publishing rules and regulations in their tariffs. Two commissioners felt that both rules 7 and 8 were unnecessary because existing tariffs adequately dealt with the problems and, further, because no specific discriminatory abuses had been shown. 322 I.C.C. at 385-86.

<sup>142</sup> *Atchison, T. & S.F. Ry. v. United States*, 244 F. Supp. 955 (N.D. Ill. 1965).

<sup>143</sup> Rule 7(a) provides that:

Each railroad performing or holding out to perform TOFC service shall publish, post, and file tariffs . . . which shall contain in clear and explicit terms all of the rates and charges for and the rules governing the leasing of equipment to any person using its TOFC service (whether by the railroad itself or by any person affiliated with or controlled by the railroad or any agents of the railroad) . . .

49 C.F.R. § 500.7(a) (1967).

The court did not accept the railroad's argument, but did find that the rule was ambiguous in that it was not restricted to a lease made for the purpose of a TOFC shipment. The court indicated that such an unrestrictive provision would be beyond the Commission's authority, but that should the lease requirements be limited to TOFC transportation, then under Section 6(1) of the Act, the Commission would have the power to require the tariff publication of all charges and rules concerning the use of trailers as instrumentalities of transportation. Since the proceeding was being remanded to the Commission in respect to the open-tariff rules, the court also requested the Commission to resolve this ambiguity.<sup>144</sup>

The Supreme Court, in reviewing the district court's decision, concentrated exclusively upon the open-tariff issues.<sup>145</sup> However, the question concerning the validity of the trailer-leasing rules was brought to the attention of the Supreme Court, not in any of the three petitions filed in the *American Trucking* case, but in a separate appeal brought by the New York Central Railroad Company.<sup>146</sup> This separate appeal raised two questions: (1) may the ICC require the tariff publication of leasing rules; and (2) was the imposition of such rules upon the railroads, without a similar demand upon motor carriers and freight forwarders who also lease trailers to shippers for piggyback shipments, an unlawful discrimination against the railroads in violation of the National Transportation Policy. The Court, per curiam, affirmed those portions of the judgment of the district court from which appeal was taken.

Since the New York Central was appealing from that portion of the district court's opinion which held that, absent the ambiguity, the ICC had the power to promulgate such a rule, it is settled that the Commission may impose the trailer-leasing rules. As to the ambiguity question, it is a fair surmise that rule 7(a) will be read to mean that leasing rules must be published only in conjunction with TOFC shipments. If a railroad wants to lease its equipment for purposes wholly unrelated to TOFC movements, however, rule 7(a) would not require it to promulgate tariff rules concerning such arrangements.

Aside from the fact that the parties' prime concern was with the open-tariff question, there was another reason why the trailer leasing rules received little attention in the courts. The motor carriers, throughout the Commission proceeding, had taken the position that the trailer-leasing and tariff publication rules should be established on the principle that the railroad be required to maintain a complete TOFC service and then publish allowances to be paid shippers for any part of the

<sup>144</sup> 244 F. Supp. at 971.

<sup>145</sup> *American Trucking Ass'ns v. Atchison, T. & S.F. Ry.*, 387 U.S. 397 (1967).

<sup>146</sup> *New York Cent. R.R. v. United States*, 388 U.S. 445 (1967).

transportation service of facilities supplied by the shipper. This issue was authoritatively resolved adversely to the motor carrier position in 1964, prior to the time for filing an appeal from the *Ex Parte* 230 order.<sup>147</sup>

Lack of interest in having judicial review of the billing and notification regulations can generally be placed on the relative unimportance of these rules in their practical application. Also, most of the really strong opposition to particular features of these rules was resolved at the Commission level.<sup>148</sup> The rules originally propounded for the transportation industry were in the main, clear-cut solutions to existing problems. The remedies proposed were often drastic, such as abolishing trip-leasing. The sure result of this approach was to generate the highly partisan views of all segments of the industry. In an industry with a long tradition of regulation and with sophisticated methods of dealing with and being heard on regulatory problems, this approach worked well. All views were represented and the Commission had maximum enlightenment before reaching its conclusions. The results were evident in a series of billing and tariff rules that were generally acceptable to shippers and carriers alike.

#### IV. CONCLUSION

The piggyback case will undoubtedly emerge as one of the truly important ICC opinions simply because it sets that agency's guide for an entire area of transportation which is fast emerging as a very important one. All the problems of TOFC are not solved by these rules, nor is there any guarantee that all of the rules even properly interrelate. Problems will continue to exist, and perhaps one or more of the rules will be changed or even circumvented. One thing is certain, however; litigation will continue, particularly in the areas where the rules do not tread, e.g., in costing. Nevertheless, the basic guides are here and, as important economic criteria, there can be little doubt that their impact will be felt for some time.

<sup>147</sup> *Cooper-Jarrett, Inc. v. United States*, 226 F. Supp. 318 (W.D. Mo. 1964).

<sup>148</sup> It should be noted that one dissenting commissioner strongly objected to the trailer-leasing rule. He believed the record did not support it. More importantly, he felt that it would jeopardize the railroads' existing trailer investment. This would occur as nonregulated leasing concerns undercut the railroad tariff terms. The investment of the New York Central Railroad Company in flexivan equipment was cited as an example. In that instance his insight was apparently correct, since the New York Central was the only railroad to appeal, although unsuccessfully, the Commission's trailer-leasing rule. *New York Cent. R.R. v. United States*, 388 U.S. 445 (1967).

# BOSTON COLLEGE INDUSTRIAL AND COMMERCIAL LAW REVIEW

---

VOLUME IX

FALL 1967

NUMBER 1

---

## BOARD OF EDITORS

WILLIAM F. M. HICKS

*Editor in Chief*

JOHN R. SHAUGHNESSY, JR.  
*Article and Book Review Editor*

DAVID H. CHAIFETZ  
*Casenote and Comment Editor*

STEVEN C. UNSINO  
*Symposium Editor*

F. ANTHONY MAIO  
*Case Editor*

JOHN J. REID  
*Uniform Commercial Code Editor*

SAMUEL P. SEARS, JR.  
*Casenote and Comment Editor*

PETER W. BRADBURY  
*Managing Editor*

JOHN A. DOOLEY III  
*Legislation Editor*

## EDITORIAL STAFF

PETER A. AMBROSINI  
WALTER ANGOFF  
RUTH R. BUDD

JAMES A. CHAMPY  
RICHARD K. COLE  
JOSEPH GOLDBERG  
WALTER F. KELLY, JR.

JOSEPH M. KORFF  
ANDREW J. NEWMAN  
ELIZABETH C. O'NEILL

## REVIEW STAFF

LAWRENCE T. BENCH  
ROBERT S. BLOOM  
JOHN R. HICINBOTHAM  
DAVID J. LEVENSON

PETER J. MONTE  
THOMAS R. MURTACH  
WILLIAM A. RYAN, JR.  
JEFFREY M. SIGER

MITCHELL J. SIKORA  
JOSEPH F. SULLIVAN, JR.  
ROBERT D. TOBIN  
DAVID M. WINER

## FACULTY COMMITTEE ON PUBLICATIONS

RICHARD G. HUBER  
*Chairman*

FREDERICK M. HART

WILLIAM F. WILLIER  
*Faculty Adviser to the Law Review*

JAMES L. HOUGHTELING

---

JACQUELINE COOKE  
*Administrative Assistant*